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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-524

WILLIAM THISTLETHWAITE,

Petitioner,

—against—

THE CITY OF NEW YORK, THE PARKS RECREATION AND CULTURAL AFFAIRS ADMINISTRATION and AUGUST HECKSCHER and RICHARD M. CLURMAN, as former and present administrators, respectively, of the Parks, Recreation and Cultural Affairs Administration,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Preliminary Statement

This is an action brought under the Civil Rights Act seeking declaratory and injunctive relief with respect to a rule of the New York City Parks Recreation and Cul-

tural Affairs Administration requiring a permit for the distribution of literature in City parks. The District Court for the Southern District of New York (POLLACK, J.) dismissed the complaint on the ground that it was barred by *res judicata*. The Court of Appeals for the Second Circuit, one judge dissenting, affirmed on essentially the same ground, holding that prior state criminal proceedings involving the identical constitutional issue as that involved here collaterally estopped the petitioner from raising this issue again in a civil rights action. An application for rehearing en banc was denied.

Questions Presented

The petitioner (hereafter referred to as the plaintiff) was convicted in state criminal proceedings of distributing literature, in areas under the jurisdiction of the City's Parks, Recreation and Cultural Affairs Administration, without the permit required by the Administration's regulations. At his criminal trial and on appeal of his conviction, he challenged the permit requirement as violative of the First Amendment. In this civil rights action, he does not seek to overturn his conviction, but seeks a declaration that the permit requirement, as applied to him, violates the First Amendment.

1. Does the prior state adjudication collaterally estop plaintiff from challenging the permit requirement, as applied to him, as a violation of the First Amendment?

2. Assuming that collateral estoppel does not entirely preclude this litigation, does a nondiscriminatory permit requirement, which does not vest discretion in park officials to deny or revoke permits except for limited reasons unrelated to the curtailing of freedom of speech, violate the First Amendment?

Facts

(1)

The plaintiff and another individual, Sol Lockshon, who was a plaintiff below but is not a petitioner here, were convicted in New York criminal proceedings of distributing literature in areas under the jurisdiction of New York City's Parks, Recreation and Cultural Affairs Administration without the permit required by Section 13 of the Administration's Rules and Regulations (A5-A6).* In this civil rights action they did not collaterally attack their convictions, but sought declaratory and injunctive relief invalidating the permit requirement (A8).

Section 13 of the Administration's Rules and Regulations provides as follows (A14):

> "No person shall hold any meeting, perform any ceremony, make an address, exhibit or distribute any sign, placard, declaration or appeal of any description in any park or park-street, except by permit from Parks, Recreation and Cultural Affairs Administration. Upon application, the Administrator shall issue such permit unless: (1) the use for which the permit is sought would substantially interfere with park use and enjoyment by the public: (2) the location selected is not suitable because of special landscaping and planting: (3) the location is not suitable because it is a specialized area including but not limited to, a zoo, swimming pool, or skating rink; (4) the date and time requested have

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* Numbers in parentheses *preceded* by "A" refer to pages of the Joint Appendix in the Court of Appeals for the Second Circuit. Numbers *followed* by "A" refer to pages of the Appendix annexed to the Petition for Certiorari.

previously been allotted by permit. Whenever a permit is denied, alternative suitable locations and dates shall be offered to the applicant."

The plaintiffs also attacked, as part of their challenge to Section 13, Section 11 of the Administration's Rules and Regulations which states *inter alia* that "A permit may be granted upon such terms and conditions as the Administrator shall reasonably impose" (A13, A5, A36) and the following two statements which appear on permit application forms (A19, A5): "4. It is prohibited to distribute, place, post, display or cast about any pamphlets, handbills, placards, signs or any other appeals or advertising matter within any park or on any park street. No advertising of any kind is permitted on programs. * * * 9. The permit if granted is not transferable and is revocable at any time in the absolute discretion of the Commissioner."

(2)

The facts as to the state criminal proceedings are as follows:

On June 27, 1970, plaintiff Thistlethwaite was stopped from distributing political leaflets in Central Park, because he had no permit from the Administrator of the Parks, Recreation and Cultural Affairs Administration, and he was charged with a violation of Section 13 of the Administration's Rules and Regulations which requires a permit (A5-A6). A copy of the leaflet appears at page A20 of the Joint Appendix in the Court of Appeals. On April 17, 1971, Sol Lockshon, a plaintiff below but not a petitioner here, was similarly charged, for having distributed a political leaflet on a sidewalk at Central Park West (A6). Neither plaintiff had applied for a permit (A6).

The two plaintiffs were tried in a consolidated proceeding before the Criminal Court of the City of New York, New York County (LANE, J.), on January 13, 1972, were found guilty of violating Section 13, and were sentenced to a fine of $10.00 or two days in jail (A6).

At the state criminal trial the plaintiffs moved to dismiss the prosecution on the ground that Section 13, as applied to them, as sole distributors of political literature, was void as a violation of their First Amendment rights (A6). A copy of those portions of the transcript of the criminal trial which involve the plaintiffs' motions to dismiss were submitted by the defendants on the defendants' motion to dismiss the instant action and appear in the Joint Appendix in the Court of Appeals at pages A23-A32.

The plaintiffs' motions to dismiss in the state court were denied without opinion (A6, A31-A32). By order dated November 17, 1972, the Appellate Term of the New York State Supreme Court affirmed the judgments of the Criminal Court without opinion. On December 22, 1972, their applications for leave to appeal to the State Court of Appeals were denied (A6-A7).

(3)

Before answer, the defendants moved to dismiss the complaint on the grounds, *inter alia*, that the state criminal proceedings preclude relitigation in this action (A22-A32). The plaintiffs moved for a preliminary injunction (A33-A41). The transcript of an evidentiary hearing held on these motions appears in the Joint Appendix in the Court of Appeals at pages A42-A103.

At the hearing, plaintiff Lockshon testified that his lawyer had told him that, on the advice of the District Court,

he should seek a permit (A50-A51). Plaintiff Lockshon testified that he did obtain a permit and distributed leaflets pursuant to it (A49, A50, A58-A59).

Hillel Gedrich, an attorney in the counsel's office of the Parks Administration testified as to the reasons for the permit requirement (A68 *et seq.*). He noted that "we attempt to make some reasonable regulation of use of park property to deal with various competing interests on the part of the public" (A69). He testified that specialized uses must be protected, so that, for example, people are not allowed to distribute leaflets on a baseball field in the park (A70).

Gedrich noted the reasons why the permit issued to plaintiff Lockshon differed in certain respects from the application (A70-A74).

Gedrich also testified that permits for distributing literature are issued as a matter of course by the Parks Department (A74, A82). He noted (A74):

> "We try to ask applicants to use areas that we call forum areas, because we hope that the type of activity will be concentrated there and it will be a fairer distribution, as it were, of the competition for use of the parks. We have set aside areas for many special purposes and one of them we call forum areas which are, one, easier to clean up, and two, are designated as forum areas, hopefully to attract people who would be perhaps more interested in exchanging ideas rather than in sitting quietly or in playing baseball or in eating."

In response to questioning by the plaintiffs' counsel, Mr. Gedrich testified that he was familiar with the interpretation given to the regulations and to the permit application forms and permits (A80). He testified that statement num-

ber 4 on the application form (*ante*, p. 4) which says that it is prohibited to distribute matter in the parks is "interpreted to mean that no distribution of leaflets or other matter is permitted unless it's specifically permitted by the terms of the permit" (A81-A82). For example, if a permit is issued for a musical program in the park, leaflets cannot be handed out at the performance unless that is allowed by the permit (A82).

When asked about the statement on the application form (*ante*, p. 4) saying that the permit is revocable in the Commissioner's discretion, Mr. Gedrich noted that the exercise of such discretion is "really based on the fact that park land is inalienable, and we have had several of our past concession agreements and other permit agreements declared to be the equivalent of leases and therefore null and void; so that any time we give any kind of a permit or license or any kind of an agreement to use park property, it is always revocable at will by the Commissioner * * *" (A82-A83). He added (A83): "We, I think, are under a very strong obligation not to operate in an arbitrary or capricious manner and we don't. When there is any danger of specific problems arising we make our regulations specific enough so that the discretion is removed." Thus, he testified, the Commissioner can grant permits on terms that are reasonable and does not exercise absolute discretion (A83-A84). Plaintiff Lockshon's permit was, to his knowledge, not revoked (A85). If a permit is revoked, it is for a specific cause (A85-A86). One would be "failure to abide by the terms of the permit in some significant way" (A86). Also, where there is a permit of substantial duration, it may have to be revoked, for example, to reach a sewer beneath the permit area (A86).

Opinions Below

District Court Opinion
362 F. Supp. 88

In granting the motion to dismiss, the District Court wrote an extensive opinion (A106-A119). The Court described the prior state court proceedings and noted that the plaintiffs had not sought review by the United States Supreme Court or collateral relief through habeas corpus (A107-A108). It then reviewed the proceedings in this action and its denial of preliminary relief (A108).

The Court went on to discuss the principles of res judicata applicable to this case: that state court judgments must be accorded full faith and credit by federal courts; that state as well as federal judges are charged with preserving and applying the federal Constitution; and, accordingly, that state court rulings cannot be collaterally challenged in federal civil rights actions (A109-A111). The Court also noted the various important policies behind the principle of res judicata, including comity and the avoidance of duplicative litigation (A112-A113). The Court went on to find that these principles apply to criminal prosecutions, which can provide an appropriate forum for the adjudication of constitutional rights (A114).

The Court concluded that "the convicted defendants ought not to be permitted to maintain a civil rights suit seeking a declaration of constitutional invalidity and an injunction against enforcement of the questioned local rule, when they have affirmatively raised the unconstitutionality of the local rule in the criminal proceeding and pursued that challenge on appeal through the state courts" (A110, A114-A116). The Court added that to allow this suit to continue "would sanction the type of repetitive litigation which is contrary to the policies underlying *res*

judicata and to comity between federal and state courts" (A116-A117).

The Court rejected the other grounds for the motion to dismiss, which were the absence of a case or controversy and the failure to state a claim upon which relief may be granted (A118-A119).

Court of Appeals Majority Opinion
497 F. 2d 339

The Court of Appeals reviewed the prior proceedings and the District Court's decision (2A-4A). It then discussed the various arguments made by the plaintiffs and concluded that "in the current context we find these arguments unpersuasive" (4A).

The Court rejected the plaintiffs' argument "that the present cause of action is different from the prior criminal suit because it attacks the whole system of permit dispensing and seeks prospective relief against its enforcement." In so doing, it said (4A):

> ". . . it is quite clear that the gist of the current suit is that the regulations are unconstitutional; it is also clear that this question was at issue and determined against the appellants in the state action. A perusal of the briefs submitted to the Appellate Term cannot fail to convince that the whole regulatory scheme was assailed, on its face and as applied to appellants. Memorandum of Appellants in Support of Certification to the Court of Appeals at 3; Brief for Appellants in the Appellate Term, First Department at 9-10. We are thus convinced that the assault was broadly based and broadly considered."

The Court also rejected the claim that the prospective nature of the relief sought necessarily precluded estoppel, saying (4A-5A):

> "In appellants' view there has been merely a determination of law based on 'expired' facts and the prior decision should be considered here solely on the basis of *stare decisis*—persuasive perhaps but certainly not conclusive. However, it was in fact determined by a court of competent jurisdiction that it was proper for the Parks Administration to require distributors of political literature who wish to distribute their pamphlets in a park to obtain a permit. If this determination, applying the regulation in question to facts identical to those presently alleged, is seen to bind appellants, they certainly cannot succeed on the present course of litigation."

The Court then went on to discuss the plaintiffs' alternative argument that, even if collateral estoppel would otherwise apply, the policy underlying the Civil Rights Act would best be served by refusing to apply collateral estoppel here. This argument was also rejected, the Court saying (5A):

> "While we recognize the particular nature of the Civil Rights Act and the intent of Congress embodied therein, we are not of the opinion that the trial judge applied the doctrines of res judicata 'mechanically' to the facts of this case; further we do not read in the act any intent to foster career litigants. *Lackawanna Police Benevolent Association* v. *Balen*, 446 F. 2d 52 (2d Cir. 1971); *see also Rosenberg* v. *Martin*, 478 F. 2d 520, 525 (2d Cir. 1973); Friendly, Federal Jurisdiction: A General View 101 n. 113."

Finally, the Court addressed the argument that there can be no estoppel because the plaintiff had not elected the state forum (6A). As to this argument, the Court first rejected the contention that an election of the state tribunal is required before collateral estoppel can apply (6A). However, it noted "in passing", first, that, "At the very least, it seems clear that both [plaintiffs] had determined to pursue the New York action to a conclusion on constitutional grounds" and, second, that "habeas corpus is generally available in situations similar to the one at hand" (6A-7A).

The Court did not refer to the notation in our brief that, under the rule laid down in *Monroe* v. *Pape*, 365 U. S. 167, 187-192 (1961), this civil rights action does not lie against the defendant City of New York or the defendant Parks, Recreation and Cultural Affairs Administration.

Court of Appeals Dissenting Opinion

The dissenting Circuit Judge, while acknowledging that the doctrines of res judicata and collateral estoppel have been applied in civil rights actions, was of the opinion that collateral estoppel does not apply here because the present suit presents different issues from those raised in the earlier, criminal suit (9A-11A). In addition, the dissenting judge expressed disapproval of the application of collateral estoppel to a criminal conviction "so as to defeat a civil rights action seeking a declaratory judgment as to future enforcement of a statute," particularly where First Amendment rights are allegedly involved (12A-13a).

POINT I

The plaintiffs fully litigated the very constitutional issues they urge here in prior state criminal proceedings. Consequently, they are estopped from relitigating those issues in this civil rights action.

(1)

The first reason urged by the plaintiff (Pet., p. 9) as to why certiorari should be granted is that this case is similar to another case pending before this Court, namely, *Ellis* v. *Dyson*, 358 F. Supp. 262 (N.D. Tex., 1973), affd. without opinion 475 F. 2d 1402 (5th Cir., 1973), cert. gr. 416 U.S. 954 (1974). We submit that the plaintiff's reliance on *Ellis* is entirely misplaced, because the doctrine of collateral estoppel upon which we, and the courts below relied, has played no part at all in the *Ellis* case. In *Ellis*, the Court dismissed a civil rights complaint seeking declaratory and injunctive relief from an anti-loitering ordinance of the City of Dallas. The complaint stated that the plaintiffs had been arrested and charged with violation of the ordinance, that they had unsuccessfully sought a writ of prohibition from the Texas Court of Criminal Appeals on the grounds the ordinance was unconstitutional and that they were later convicted after entering pleas of nolo contendere (358 F. Supp. at p. 264). In the civil rights action, the plaintiffs sought a declaration that the ordinance was unconstitutional and, in addition, certain collateral relief with respect to their convictions, such as expungement of their arrest records (p. 264, fn. 3). The defendants moved to dismiss for lack of jurisdiction and failure to state a claim. Alternatively, they asked the Court in its discretion to obstain from exercising jurisdiction (p. 263). The Court, without reaching plaintiffs' motion for summary judg-

ment or defendants' motion for abstention, granted defendants' motion to dismiss (p. 264).

The District Court's opinion in *Ellis* indicates that neither the defendants, nor the Court on its own, ever raised the doctrines of res judicata and collateral estoppel. Nor does it appear in *Ellis* that there was any effort to establish the basis for a collateral estoppel, by presenting, as is required, and as was done in the case at bar, the record of the criminal trial to show that the issues allegedly subject to an estoppel were in fact fully and fairly litigated there.

The District Court in *Ellis* dismissed the complaint on a ground entirely separate and distinct from that at issue here. Following various Fifth Circuit decisions, it held that the rule of *Younger* v. *Harris*, 401 U.S. 1 (1971), should be extended to cases where state criminal prosecutions are not pending, but merely threatened. Consequendy, it held that, in the absence of bad faith prosecution, harassment or other unusual circumstances, the complaint must be dismissed (p. 265). That holding appears to be in direct conflict with this Court's recent decision in *Steffel* v. *Thompson*, 415 U.S. 452 (1974). The District Court in *Ellis* also relied on the plaintiffs' failure to exhaust state appeal processes after their convictions (pp. 265-266). As indicated in the summary of the case appearing in 42 U.S.L.W. 3105, the exhaustion issue and the issue respecting threatened state prosecutions were the only ones presented by the certiorari petition. Thus, the *Ellis* case does not present the issue involved here.

We also note that the plaintiff's reliance on cases such as *Steffel, supra, Younger, supra, O'Shea* v. *Littleton*, 414 U.S. 488 (1974), and *Mitchum* v. *Foster*, 407 U.S. 225 (1972), is similarly misplaced. None of those cases involved the applicability of the doctrines of res judicata

and collateral estoppel. Nor are the general principles of federalism and comity and the need for a case or controversy, as discussed in those cases, in conflict in any way with the application to this case of established rules of res judicata and collateral estoppel.

(2)

The Full Faith and Credit Clause of the United States Constitution requires that state court judgments be given the same res judicata effect in federal courts, as in state courts, even where federal constitutional questions are involved. *American Surety Co.* v. *Baldwin*, 287 U.S. 156 (1932); *Gart* v. *Cole*, 263 F. 2d 244 (2nd Cir., 1958), cert. den. 359 U.S. 978 (1959). The plaintiff does not avoid the application of the principles of res judicata and collateral estoppel merely because he sues under the federal Civil Rights Act. *Johnson* v. *Dept. of Water and Power*, 450 F. 2d 294 (9th Cir., 1971); *Lackawanna Police Benevolent Association* v. *Balen*, 446 F. 2d 52 (2nd Cir., 1971); *PI Enterprises* v. *Cataldo*, 457 F. 2d 1012 (1st Cir., 1972). See *Francisco Enterprises, Inc.* v. *Kirby*, 482 F. 2d 481, 485 (9th Cir., 1973), cert. den. 415 U.S. 916 (1974); *Paul* v. *Dade County, Florida*, 419 F. 2d 10 (5th Cir., 1969), cert. den. 397 U.S. 1065 (1970); *Shadid* v. *Oklahoma City*, 494 F. 2d 1267, 1268 (10th Cir., 1974). In the *Lackawanna* case the plaintiff in the state courts had unsuccessfully challenged the constitutionality of a New York statutory provision governing the number of hours worked by police officers. The Court, in a per curiam decision, held that the plaintiff's federal suit, brought under the Civil Rights Act, should have been dismissed on the ground that the state court judgment was res judicata. The Court said:

> "Having lost in the state courts, plaintiff's remedy was to seek review by the Supreme Court. The

> Civil Rights Act, unlike federal habeas corpus, does not permit a second bite at the cherry. Howe v. Brouse, 422 F. 2d 347 (8 Cir. 1970); Scott v. California Supreme Court, 426 F. 2d 300 (9 Cir. 1970)."

But Cf. Lombard v. *Board of Education,* 502 F. 2d 631 (2nd Cir., 1974), in which the Court refused to apply res judicata on the ground that the plaintiff had not specifically raised his procedural due process claim in the prior state proceeding.

In *Preiser* v. *Rodriguez,* 411 U.S. 475, 497 (1973), this Court, citing cases in various Circuits, stated that *"res judicata* has been held to be fully applicable to a civil rights action brought under §1983."

The plaintiff in this action challenges the requirement that he, as a sole distributor of political literature, obtain a permit before such distribution in parks. In defending criminal charges brought against him in the state courts for distributing literature without a permit, he moved to dismiss the charges on the very constitutional grounds which are the basis of the instant action, to wit, that Section 13's permit requirement impairs his First Amendment right to freedom of speech (A23-A32).

When the motion was denied and he was found guilty, he appealed to the Appellate Term of the New York State Supreme Court. When that court affirmed the judgment of the Criminal Court, he unsuccessfully sought leave to appeal to the New York Court of Appeals (A6-A7). Any doubt as to what was litigated in the criminal case is removed by an examination of the plaintiff's briefs in the state courts. They make clear that the constitutional issues litigated in the state courts are identical to those being urged here. As stated by the Court below (4A):

> ". . . it is quite clear that the gist of the current suit is that the regulations are unconstitutional;

it is also clear that this question was at issue and determined against the appellants in the State action. A perusal of the briefs submitted to the Appellate Term cannot fail to convince that the whole regulatory scheme was assailed, on its face and as applied to appellants. Memorandum of Appellants in Support of Certification to the Court of Appeals at 3; Brief for Appellants in the Appellate Term, First Department at 9-10. We are thus convinced that the assault was broadly based and broadly considered."

The plaintiff made no effort to obtain review in the United States Supreme Court.

(3)

That the prior judgment on which we rely was made in a criminal case does not make the rules of res judicata and collateral estoppel inapplicable. It is established that a criminal conviction may work an estoppel in a subsequent civil proceeding as to questions distinctly put in issue and directly determined. *Emich Motors Corp.* v. *General Motors,* 340 U.S. 558, 568-569 (1951). Absent some overriding principle of public policy, there is no reason why a litigant, once given a full and fair opportunity to present his case, should be allowed to relitigate a matter previously decided against his position in a criminal proceeding. *Palma* v. *Powers,* 295 F. Supp. 924, 933-936 (N.D.Ill., 1969).

For examples of cases where parties were collaterally estopped from urging a constitutional issue in a federal civil rights suit by a prior adverse determination of that issue in a state criminal proceeding, see *Goss* v. *State of Illinois,* 312 F. 2d 257, 259 (7th Cir., 1963), cited by

this Court in *Preiser* v. *Rodriguez, supra,* 411 U.S. at p. 497; *Murray* v. *Oswald,* 333 F. Supp. 490 (S.D.N.Y., 1971); *Palma* v. *Powers,* 295 F. Supp. 924 (N.D.Ill., 1969); *Pinkus* v. *Arneberg,* 258 F. Supp. 996, 1004 (C.D. Cal., 1966).

The dilemma suggested by the plaintiff (Pet., p. 15) of state criminal defendants refraining from asserting constitutional defenses in order to preserve their rights to raise constitutional issues in the federal courts vanishes on examination. A state criminal defendant can seek review in this Court to vindicate his federally protected rights (a review which the plaintiff in this case chose not to seek) and thus need not refrain from raising constitutional issues in order to obtain ultimate federal court review for his claims. In addition, even after having raised his constitutional claims fully in the state courts, a criminal defendant ordinarily may seek federal habeas corpus relief without any bar by way of res judicata.

The claim that the application of an estoppel in this case would destroy the Civil Rights Act as to any matter which is subject to a state criminal statute (Pet., pp. 13-14) is incorrect. As the plaintiff recognizes, the estoppel worked by his state conviction applies only to him and not to any other individuals who may choose to sue in federal court. This plaintiff has fully litigated the constitutional issue as it applies to him, and thus there is nothing anomalous about his being estopped from relitigating that issue while others remain free to challenge the regulation.

(4)

The plaintiff's suggestion that an estoppel cannot be imposed here because he did not "elect" to litigate the issue first in the state courts but was compelled to do so by virtue of his criminal prosecution (Pet., pp. 14-15)

contradicts the cases cited (*ante*, pp. 16-17). In addition, the plaintiff misapprehends both the nature of res judicata and collateral estoppel and the significance of the case upon which he relies.

The primary principles underlying res judicata and collateral estoppel are the need for finality of judgments and the desirability of avoiding unnecessary relitigation of issues that have already been fully litigated. The applicability of these principles is not dependent upon a further requirement that the party against whom they are being applied elected the forum in which the judgment was rendered. What is critical is that the party against whom a collateral estoppel is imposed has fully litigated the identical matter which he is being precluded from relitigating. Here that test is met.

The plaintiff's reliance (Pet., p. 14) on *England* v. *Medical Examiners*, 375 U.S. 411 (1964), is misplaced. In *England* the Court held that where a party is remitted to the state courts by an abstention order of a federal court, the party is entitled to elect whether to litigate his federal claims in the state courts or to reserve those claims for the federal court. As the Court noted (375 U.S. at pp. 415, 416): "Abstention is a judge-fashioned vehicle for according appropriate deference to the 'respective competence of the state and federal court systems'" and abstention does not "involve the abdication of federal jurisdiction, but only the postponement of its exercise". The Court found that, since res judicata would bar federal litigation of issues litigated in the state courts where a party properly invoked federal jurisdiction and the Court then abstained from acting in order to allow the state courts to resolve issues of state law, fairness required giving the plaintiff an opportunity to elect whether to litigate his federal claims in the state or federal courts. The *England* decision is entirely consistent with our posi-

tion. Nowhere in the Court's opinion is there any suggestion that res judicata does not apply to one who was a defendant in the earlier proceeding and who thus did not "elect" the forum whose judgment bars a second litigation.

Moreover, even under the plaintiff's theory of election, the crucial issue would be, not whether he elected the forum, but what issues he elected to litigate. Here, the plaintiff elected to raise in the state courts the very constitutional issues he seeks to litigate again. As the Court below found, an election of the state tribunal is not required to hold the present action barred by collateral estoppel; however, the Court noted, if any inquiry were to be made into the question of election, then "At the very least, it seems clear that both [of the plaintiffs] had determined to pursue the New York action to a conclusion on constitutional grounds" (6A-7A).

(5)

We fully agree that collateral estoppel applies only to those issues fully litigated and actually determined. The plaintiff cannot seriously dispute that the issue as to the constitutionality of the requirement that he obtain a permit before distributing political literature in the parks was fully litigated and actually determined in the state courts. His claim was that he was entitled under the First Amendment to distribute such literature in City parks without being required to obtain a permit. In this case the facts alleged, as to his being a sole distributor of political literature, are identical, and his claim, that the permit requirement as applied to him is invalid under the First Amendment, is identical. There can be no doubt that, under the rules of collateral estoppel, he is barred from relitigating this issue.

On this petition the plaintiff does not urge that there remain any other litigable issues. However, he claims that no estoppel can be applied because, unlike in the criminal suit, "he seeks prospective relief, for future threatened injury" (Pet., p. 16). We disagree, as did the Court below. The facts alleged are identical. The plaintiff is a sole distributor of political literature who seeks to distribute literature in the parks without a permit. If, at some future time, he wishes to raise a claim resting on a different pattern of facts, he must allege those facts and the claim to which he believes they give rise. He cannot avoid estoppel in this proceeding as to those facts and issues which have been litigated, merely because different facts and different claims may arise later.

POINT II

Even if relief is not barred under principles of collateral estoppel, the complaint was properly dismissed for failure to state a claim upon which relief may be granted. The requirement of a permit does not violate the First Amendment since it does not give discretion to park officials to prohibit distribution of non-commercial matter in the parks. Its only restrictions relate to interference with other park uses, completely unsuitable locations such as swimming pools, or conflicts with uses similar to that for which the permit is sought.

At the outset we note that we claim no right to bar absolutely the freedom to speak or distribute leaflets in public parks or streets. And we agree that no permit to engage in such activities may be withheld for reasons relating to the nature of the speech or the speaker or the nature of the printed material or those who distri-

bute it or on the basis of any other ground which would be unreasonable in light of its restraint of free speech.

This Court has repeatedly upheld the principle that municipalities may impose reasonable restrictions on the time, place and manner of the exercise of First Amendment rights. See *California* v. *La Rue*, 409 U.S. 109 (1972), at p. 117, text and fn. 4, and cases cited therein. *Cf. Police Department* v. *Moseley*, 408 U.S. 92 (1972), where this Court struck down a city ordinance prohibiting all picketing of a school involved in a labor dispute. The Court reaffirmed the principle that the government may impose reasonable "time, place and manner" restrictions on expressive conduct (at p. 98), but found that "the central problem" with the ordinance was its description of permissible picketing in terms of subject matter (at p. 95). No such problem exists here.

The view of the Court with respect to public parks is well summarized in *Poulos* v. *New Hampshire*, 345 U.S. 395 (1953). There the Court, in upholding a licensing requirement for religious meetings in a public park, said (pp. 405-407):

> "The principles of the First Amendment are not to be treated as a promise that everyone with opinions or beliefs to express may gather around him at any public place and at any time a group for discussion or instruction. It is a *non sequitur* to say that First Amendment rights may not be regulated because they hold a preferred position in the hierarchy of the constitutional guarantees of the incidents of freedom. This Court has never so held and indeed has definitely indicated to the contrary. It has indicated approval of reasonable nondiscriminatory regulation by governmental authority that

> preserves peace, order and tranquility without deprivation of the First Amendment guarantees of free speech, press and the exercise of religion. When considering specifically the regulation of the use of public parks, this Court has taken the same position [Citing *Hague* v. *C.I.O.*, 307 U.S. 496, 515-516 (1939)]."

The Court distinguished such cases as *Kunz* v. *New York*, 340 U.S. 290 (1951) and *Saia* v. *New York*, 334 U.S. 558 (1948), on the ground that, in those cases, "the ordinances were held invalid, not because they regulated the use of the parks for meeting and instruction but because they left complete discretion to refuse the use in the hands of officials" (pp. 406-407). Again, no such problem exists here.

Section 13, at issue here, is a nondiscriminatory regulation, requiring a permit for such things as meetings, addresses and distributions in the parks, which vests only strictly limited discretion in park officials. Section 13 specifies that a permit "shall" be issued unless certain strong and specific reasons exist for denial. These reasons are, for example, that the use for which the permit is sought would substantially interfere with park use and enjoyment by others, that the site sought is in a specialized area such as a zoo or swimming area and that the date and time have previously been allotted by another permit. Moreover, Section 13 provides:

> "When a permit is denied alternative suitable locations and dates shall be offered to the applicant."

The Section is, therefore, constitutional on its face. In addition, there was evidence at the hearing to confirm that permits are issued as a matter of course and, in accord-

ance with its language, only so as to deal reasonably with the various competing uses of the parks (A68-A74).

In *People* v. *Nahman*, 298 N.Y. 95 (1948), the New York Court of Appeals upheld a Parks Department permit requirement which on its face was more restrictive than the present regulation. On the basis of a statement by the Parks Commissioner as to the manner in which the regulation was being applied, the Court treated the regulation as though it were essentially identical with the regulation presently in effect. The Court said (pp. 102-103):

> "The regulation, we repeat, confers no power to suppress the publication of facts or opinions. On the contrary, as we have tried to demonstrate, it is in essence a nondiscriminatory provision which has for its sole objective the safety, comfort and convenience of the people of the City in their appropriate uses of its public parks. To our minds the regulation—so read—is a reasonable measure of local control which affects civil liberties only in an allowable minor degree."

The regulation involved in the *Nahman* case was again upheld on the same grounds in *People* v. *Hass*, 299 N.Y. 190 (1949), app. dism. 338 U.S. 803 (1949). There, also, the conviction was for failure to obtain a permit. The appeal to this Court was dismissed for "want of a substantial federal question." Such a dismissal is a determination on the merits. See *Equitable Life Assurance Society* v. *Brown*, 187 U.S. 308, 311, 315 (1902); *Ohio ex rel. Eaton* v. *Price*, 360 U.S. 246, 247 (1959) (memo of Justice Brennan); Speech of Justice Harlan, *Record of Assn. of Bar of City of New York*, Vol. 13, pp. 541, 596 (1958).

CONCLUSION

The petition for a writ of certiorari should be denied.

November 25, 1974.

Respectfully submitted,

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